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91-1889

Supreme Court, U.S.
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No. 92-____

In The
Supreme Court of the United States
October Term, 1992

GERALD D. BAIR, DIRECTOR,
IOWA DEPARTMENT OF REVENUE AND FINANCE,
Petitioner,

vs.

BURLINGTON NORTHERN RAILROAD COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTION PRESENTED

Whether the Eighth Circuit's rule that a district court must enter a preliminary injunction whenever it finds "reasonable cause" to believe that a violation of Section 306 of the Railroad Revitalization and Regulatory Reform Act, Pub. L. No. 94-210, 90 Stat. 31, 54-55 (Feb. 5, 1976), has occurred or is about to occur, conflicts with *Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982) and *Amoco Production Co. v. Village of Gambell*, 480 U.S. 531 (1987).

PARTIES TO THE PROCEEDINGS BELOW

All parties to the proceedings below are identified in the caption.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit which gives rise to this petition is reported as *Burlington N. R.R. Co. v. Bair*, 957 F.2d 599 (8th Cir. 1992) and is appended at Exhibit I. The unreported opinion of March 26, 1991, of the United States District Court for the Southern District of Iowa, is appended at Exhibit II.

JURISDICTION

The Court has jurisdiction to issue a writ of certiorari to the United States Court of Appeals for the Eighth Circuit pursuant to 28 U.S.C. § 1254(1). This petition is timely pursuant to 28 U.S.C. § 2101(c).

STATUTES

Section 306 of the Railroad Revitalization and Regulatory Reform ("4-R") Act of 1976, Pub. L. No. 94-210, 90 Stat. 31, 54-55 (Feb. 5, 1976), codified with some language modifications at 49 U.S.C. § 11503, provides, in relevant part:

> (1) [A]ny action described in this subsection is declared to constitute an unreasonable and unjust discrimination against, and an undue burden on, interstate commerce. It is unlawful for a State, a political subdivision of a State, or a governmental entity or person acting on behalf of such State or subdivision to commit any of the following prohibited acts:
>
> . . . .
>
> (2) Notwithstanding any provision of section 1341 of title 28, United States Code, [the Tax Injunction Act] or of the constitution or laws of any State, the dis-

> trict courts of the United States shall have jurisdiction, without regard to amount in controversy or citizenship of the parties, to grant such mandatory or prohibitive injunctive relief, interim equitable relief, and declaratory judgments as may be necessary to prevent, restrain, or terminate any acts in violation of this section . . .

The full text of Section 306 is appended at Exhibit III. The codification of the statute at 49 U.S.C. § 11503 is appended at Exhibit IV.

STATEMENT OF THE CASE

On July 27, 1990, Burlington Northern Railroad Company, ("Burlington Northern") filed a complaint against Gerald D. Bair, Director of the Iowa Department of Revenue and Finance, ("Bair") in United States District Court for the Southern District of Iowa. Jurisdiction for the complaint was founded in Section 306 of the 4-R Act. Burlington Northern sought to prohibit Bair from collecting ad valorem taxes assessed for the 1989 year. Iowa ad valorem taxes are payable in two installments. Burlington Northern paid 75 per cent of the first installment and agreed with Bair to a consent injunction which placed the remaining 25 per cent of the first installment in escrow. Before the second installment came due, Burlington Northern moved the district court for a preliminary injunction prohibiting Bair from collecting or attempting to collect any portion of Burlington Northern's second

installment. Bair resisted the motion. The trial court heard Burlington Northern's motion on March 8, 1991.

Both parties supplemented their argument on the motion with briefs and affidavits. Burlington Northern made no attempt to qualify for a preliminary injunction under traditional equitable standards,[1] but argued that it was still entitled to an injunction on showing reasonable cause to believe Section 306 had been or was about to be violated. Under the reasonable cause standard, the district court does not balance the equities between the parties, but, instead, simply determines whether reasonable cause exists to believe that a violation of the act has occurred. Bair contended that the district court should

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[1] The Eighth Circuit's four customary criteria for determining the propriety of issuing a preliminary injunction are set out in *Dataphase Sys., Inc. v. C L Sys., Inc.*, 640 F.2d 109, 113 (8th Cir. 1981): "(1) the threat of irreparable harm to the movant; (2) the state of the balance between this harm and the injury that granting the injunction will inflict on other parties litigant; (3) the probability that movant will succeed on the merits; and (4) the public interest." Burlington Northern could not meet these criteria, in part, because it had already established that it had an adequate remedy at law (i.e., there would be no irreparable harm) in *Burlington N. R.R. Co. v. Bd. of Sups. of Adair County*, 418 N.W.2d 72 (Iowa 1988) (holding that Iowa state courts would enforce refunds of any taxes the federal courts determined were paid in violation of Section 306.)

apply traditional equitable principles to determine whether an injunction should issue under Section 306. The trial court held that the injunction should issue based on the "reasonable cause" standard and also held that only Burlington Northern's evidence, and not Bair's, was germane to the determination. After reviewing Burlington Northern's evidence, the court found sufficient facts to show reasonable cause, although those facts were disputed, and issued the injunction. As a result, local governments in Iowa were deprived of approximately one million dollars in budgeted and assessed taxes.

Bair took an interlocutory appeal to the United States Court of Appeals for the Eighth Circuit. The Eighth Circuit affirmed that under Section 306 the test for determining if a preliminary injunctions should issue on reasonable cause was whether there is reasonable cause to believe that Section 306 had been or was about to be violated. The Eighth Circuit reversed the trial court regarding the application of the standard and remanded for consideration of Bair's evidence. Bair now petitions the Court to review whether mandatory injunctive relief based on the "reasonable cause" standard is an unwarranted surrender of traditional equitable discretion.

REASONS FOR GRANTING THE WRIT

The Court should issue the writ to preserve traditional judicial discretion over equitable cases.

The Eighth Circuit's holding that "where Congress expressly provides for injunctive relief to prevent violations of a statute, a plaintiff does not need to demonstrate irreparable harm to secure an injunction" should be corrected. This holding reveals a misconception of the relation between Congress and the Judiciary. The correct rule is: "[u]nless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied." *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946); *quoted with approval in Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982); *accord, Amoco Production Co. v. Village of Gambell*, 480 U.S. 531 (1987).

The Eighth Circuit decision failed to respect the plain language of Section 306 of the 4-R Act, which grants equitable discretion over the whole range of interim equitable relief. Section 306 provides: "the district courts of the United States shall have jurisdiction . . . to grant . . . interim equitable relief . . . as may be necessary . . ." As discussed in greater detail in the Argument below, the statutory reference to interim relief in permissive terms is an accurate reflection of Congressional intent. Thus, neither the plain language nor the necessary and inescapable inferences of Section 306 restrict traditional equitable jurisdiction. In fact, the plain language of Section 306 and the Congressional history show that Congress intended traditional principles of equity to govern both preliminary and permanent injunctions.

Furthermore, the implications of the Eighth Circuit's abandonment of judicial discretion in equity extend beyond cases arising under Section 306 of the 4-R Act. In a number of instances, Circuit Courts of Appeal have created non-traditional standards for injunctive relief.[2] The Eighth Circuit's decision in this case adds to the confusion regarding the standard to apply under any federal statute that authorizes interim equitable relief.

ARGUMENT

I. The Eighth Circuit's Decision Is Appropriate For Review As A Final Statement Of The Standard Governing Preliminary Injunctions.

The decision of the Eighth Circuit remands the case to the district court to consider all the evidence available to it before determining whether there is reasonable cause to believe that a violation of Section 306 has occurred or is about to occur. However, as to whether the standard

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[2] *See, e.g.,* the development of the "reasonable cause" and other standards in cases arising under Section 10(j) of the Labor Management Relations Act, 29 U.S.C. § 141 et seq., such as: *Boire v. International Brotherhood of Teamsters*, 479 F.2d 778 (5th Cir. 1973); *Szabo v. P*I*E Nationwide, Inc.*, 878 F.2d 207 (7th Cir. 1989); *Squillacote v. Meat and Allied Food Workers*, 534 F.2d 735 (7th Cir. 1976); and, *Aguayo ex rel. NLRB v. Tomco Carburetor Company*, 853 F.2d 744 (9th Cir. 1988).

for issuing a preliminary injunction is traditional equitable balancing or "reasonable cause," the decision is final. *See, City of New Orleans v. Dukes*, 427 U.S. 297 (1976). It is the Eighth Circuit's adoption of the "reasonable cause" standard that Bair seeks to have reviewed.

II. The Eighth Circuit's Holding That Reasonable Cause To Believe That A Violation Of Section 306 Of The 4-R Act Has Occurred Requires Injunctive Relief Conflicts With *Weinberger v. Romero-Barcelo* And *Amoco Production Co. v. Village of Gambell*.

The Eighth Circuit avoided following *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982) ("*Weinberger*") by restricting its reading of *Weinberger* to the Federal Water Pollution Control Act. The Ninth Circuit made the same mistake in *Village of Gambell v. Hodel*, 774 F.2d 1414 (9th Cir. 1985). The Court reversed the Ninth Circuit in *Amoco Production Co. v. Village of Gambell*, 480 U.S. 531 (1987), establishing that *Weinberger* cannot be so narrowly restricted.

The Court's decision in *Weinberger* governs all requests for injunctive relief in federal courts, not merely those which arise under the Federal Water Pollution Control Act:

> An injunction should issue only where the intervention of a court of equity "is essential in order effectually to protect property rights against injuries otherwise irremediable." . . . . The Court has repeated-

> ly held that the basis for injunctive relief in the federal courts has always been irreparable injury and the inadequacy of legal remedies . . . .
>
> The grant of jurisdiction to insure compliance with a statute hardly suggests an absolute duty to do so under any and all circumstances, and a federal judge sitting as a chancellor is not mechanically obligated to grant an injunction for every violation of law . . . .

456 U.S. at 312, 313 (citations omitted). Review by the Court is essential to require the Eighth Circuit to comply with the *Weinberger* decision.

III. The Eighth Circuit Erred When It Read The Statutory Authorization For "Interim Equitable Relief . . . As May Be Necessary" As A Directive to Abandon Traditional Judicial Discretion Over Preliminary Injunctions.

The Eighth Circuit correctly observed that one purpose of the 4-R Act was to cure discriminatory state and local taxation of railroads. From the purpose of the Act the Eighth Circuit inferred that Burlington Northern was entitled to a preliminary injunction by establishing reasonable cause to believe the Act had been or was about to be violated. This standard relieved Burlington Northern from proving that the payment of the disputed taxes pending resolution on the merits would cause irreparable injury and precluded the trial court from

balancing the injury to the state and local governments which would be caused by enjoining the taxes. The Eighth Circuit did not appreciate that all of Burlington Northern's interests under the 4-R Act would be vindicated by permanent injunction of any taxes Burlington Northern proved to be assessed in violation of the Act. The preliminary injunction added nothing to the surety of Burlington Northern's ultimate remedy and unnecessarily injured local governments in Iowa.

In reaching its conclusion, the Eighth Circuit ignored the unambiguous language of Section 306 which grants the injunctive powers. Two portions of the operative clause show that Congress intended the Judiciary to exercise standard equitable principles when considering interim relief. Section 306 establishes "jurisdiction . . . to grant . . . interim equitable relief . . . as may be necessary to prevent, restrain, or terminate any acts in violation of this section . . . ." First, Section 306 refers to interim equitable relief in the broadest possible terms and does not confine the relief to preliminary injunctions. Second, the relief clause is subject to the qualification "as may be necessary," -- a Congressional reference to standard equitable balancing of interests. In contrast, there is no reference whatever to "reasonable cause" in Section 306. Even though the express language establishes that preliminary injunctions are permissive, additional confirmation is found in the legislative history which shows the statutory language accurately reveals Congress' intent.

During hearings before Congress on predecessor legislation with language similar to Section 306, Paul H.

Sanders, a professor of law at Vanderbilt University testified, with respect to the proposed injunctive relief, that "unquestionably such a remedy should be fashioned in the light of well-known principles of equity." "Tax Assessments On Common Carrier Property," Hearings on H.R. 4927 Before the House Committee on Interstate and Foreign Commerce, 89th Cong., 2d Sess. (Ser. No. 89-30) 53 (1966). In favorably reporting an essentially identical bill to the full Senate about which Professor Sanders had repeated his comments, the Congressional committee hearing the bill specifically noted its agreement "with . . . the legal opinion of Professors Sanders and Hartman [Sanders' co-author]." S. Rep. 630, 91st Cong., 1st Sess. 13 ("Discriminatory State Taxation Of Interstate Carriers," Report from the Senate Committee on Commerce to Accompany S. 2289) (1969).

Congress later stated its agreement with Professor Sander's assessment in reporting on another interchangeable precursor to Section 306:

> Enactment of this section will not necessarily mean that the Federal courts will enjoin all state taxation of rail property which are the subject of complaint. The railroads will have to sustain the burden of demonstrating that discrimination exists. They will also have to make the additional showing that they are entitled to injunctive relief. With respect to the latter issue, the courts in the exercise of equity jurisdiction will balance the adverse impact on the

> community of granting such relief against the benefits to the carrier from such relief. The Federal courts will be able to devise remedies that will not be burdensome to the communities involved.

H.R. Rep. 725, 94th Cong., 1st Sess. 77-78 (Report of the Committee on Interstate and Foreign Commerce, U.S. House of Representatives, Together with Supplemental and Dissenting Views on H.R. 10979) (1975).

The Eighth Circuit reached its conclusion based on its reading of *United States v. City and County of San Francisco*, 310 U.S. 16 (1940), ("*San Francisco*") as interpreted by *Atchison, T. & S.F. Ry. v. Lennen*, 640 F.2d 255 (10th Cir. 1981) ("*Lennen*"). The Eighth Circuit cited *San Francisco* for the proposition that "where Congress expressly provides for injunctive relief to prevent violations of a statute, a plaintiff does not need to demonstrate irreparable harm to secure an injunction." However, *San Francisco* is not authority for the rule. In *San Francisco* a federal district court enjoined the City of San Francisco from continuing to violate the express statutory provisions of a specific land grant to the City of San Francisco under legislation known as the "Raker Act," 38 Stat. 242 (1913).

First, the statutory language being enforced in *San Francisco* did <u>not</u> expressly authorize federal courts to grant injunctive relief in furtherance of the express

purposes of the statute in question,[3] as implied by the Eighth Circuit. Second, there was no question in *San Francisco* that the applicable statute was being violated; the city of San Francisco admitted the violation. Rather, the issue before the Court was whether such violation could be remedied by injunction as opposed to some other form of relief:

> Here, as in the courts below, the City has defended . . . upon the grounds that . . . if Section 6 is valid and has been violated, the

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[3] The statutory language on which the injunctive relief in *San Francisco* was based, Section 9(u), provided that:

> " . . . in the event that the same [conditions specified in the Act] are not reasonably complied with and carried out by the grantee [City], upon written request of the Secretary of the Interior, it is made the duty of the Attorney General in the name of the United States to commence all necessary suits or proceedings in the proper court having jurisdiction thereof, for the purpose of enforcing and carrying out the provisions of this Act." 38 Stat. 250.

San Francisco, 310 U.S. at 18, n. 3. Thus, the Raker Act provided very little mandate with respect to relief.

> United States is not entitled to injunctive relief in equity.

San Francisco, 310 U.S. at 19 (emphasis added). This Court concluded that it was within the power of the district court below to grant an injunction:

> The equitable doctrines relied on do not militate against the capacity of a court of equity as a proper forum in which to make a declared policy of Congress effective. Injunction to prohibit continued use -- in violation of that policy -- of property granted by the United States, and to enforce the grantee's covenants, is both appropriate and necessary.

San Francisco, 310 U.S. at 31. Third, the injunctive relief sought was not a preliminary injunction but a permanent injunction based on a decision on the merits and a full evidentiary record created by both parties. Fourth, in granting the injunction, the trial court in *San Francisco* (whose decision was ultimately affirmed by this Court) essentially applied traditional equitable principles in determining whether the injunction should issue. Specifically, the trial court found that an injunction was appropriate only if money damages would not afford adequate relief. The trial court concluded that an injunction was appropriate because "[t]he injury to the Government caused by the City's violation of the Raker Act cannot be measured in terms of money damages." *United States v. City and County of San Francisco*, 23 F.Supp. 40, 53 (N.D.

Cal. 1938). However, the trial court postponed the effective date of the injunction for six months, finding that immediate implementation of the injunction "would result in serious economic waste" to the city. 23 F.Supp. at 53. Finally, even if *San Francisco* and *Lennen* once stood for the proposition attributed to them by the Eighth Circuit, the continued vitality of such a rule after *Weinberger* and *Amoco* is subject to considerable question. The Eighth Circuit did not reconcile its citation to *San Francisco* with *Weinberger* or *Amoco*.

Thus, *San Francisco* provides no authority for the Eighth Circuit's conclusion that traditional equitable principles can be abandoned simply because a statutory provision allows injunctive relief. In *San Francisco*, there was no statutory provision granting injunctive relief; the statute was admittedly being violated; the injunctive relief was issued on the merits after a full review of the facts; and the district court weighed traditional equitable principles in shaping the injunctive relief.

The adoption of the "reasonable cause" standard in determining whether preliminary injunctive relief shall issue under Section 306 of the 4-R Act is an abdication by the courts of the full scope of the courts' jurisdiction in equity. The Court should review this abdication because the "reasonable cause" standard is not supported by the language of Section 306, its legislative history, or by the decisions of this Court.

CONCLUSION

The Court should issue the writ of certiorari to the United States Court of Appeals for the Eighth Circuit and entertain full briefing and argument.

Respectfully submitted.

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EXHIBIT I

United States Court of Appeals,

FOR THE EIGHTH CIRCUIT.

No. 91-1838

Burlington Northern Railroad Company,

Appellee,

v.

Gerald D. Bair, Director of the Department of Revenue of Iowa,

Appellant.

Appeal from the United States District Court for the Southern District of Iowa

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Submitted Dec. 13, 1991.
Decided Feb. 26, 1992.

Kathleen Allyn, Boise, Idaho, argued (C.A. Daw, on the brief), for appellant.

James McBride, Washington, D.C., argued (Richard Malm, Des Moines, Iowa, on the brief), for appellee.

Before BEAM, Circuit Judge, HEANEY, Senior Circuit Judge, and LOKEN, Circuit Judge.

BEAM, Circuit Judge.

This case concerns an interlocutory appeal from a district court order granting Burlington Northern Railroad Company (BNRR) a preliminary injunction against Gerald D. Bair, Director of the Department of Revenue of Iowa. The injunction prohibits Bair and others from assessing, levying, or collecting certain Iowa property taxes. BNRR claims these actions violate section 306 of the Railroad Revitalization and Regulatory Reform (4-R) Act of 1976, Pub.L. No. 94-210, 90 Stat. 31, 54-55 (codified with some differences in language at 49 U.S.C. § 11503 (1988)).[1] Bair appeals, arguing, among other things,

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[1] Section 306 of the 4-R Act was originally codified at 49 U.S.C. § 26c (1976), but was later recodified, with slight changes in language, at 49 U.S.C. § 11503 under an Act of Oct. 17, 1978, Pub.L. No. 95-473, § 11503, 92 Stat. 1337, 1445-46. The revising act, however, declared that its provisions merely "restate" existing laws and "may not be construed as making a substantive change in the laws replaced." *Id.* § 3(a), 92 Stat. at 1466. As such, the language of section 306 is still controlling and we find it most convenient simply to refer to section 306 in this opinion.

that the district court erred in deciding whether to grant the preliminary injunction by (1) applying a "reasonable cause" standard and (2) considering only BNRR's evidence. We affirm in part, reverse in part, and remand for further proceedings.

I. BACKGROUND

On July 27, 1990, BNRR filed a complaint against Bair in federal court, seeking a permanent injunction pursuant to section 306 of the 4-R Act,[2] prohibiting Bair and others from collecting the second half of BNRR's 1989 ad valorem taxes for Iowa. BNRR alleged that the taxes, which Bair levied on behalf of Iowa, violated section 306's prohibition against discriminatory taxation of railroads. *See* 4-R Act § 306. The complaint only

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[2] Section 306 reads in pertinent part: [T]he district courts of the United States shall have jurisdiction, without regard to amount in controversy or citizenship of the parties, to grant such mandatory or prohibitive injunctive relief, interim equitable relief, and declaratory judgments as may be necessary to prevent, restrain, or terminate any acts in violation of this section, except that ... no relief may be granted under this section unless the ratio of assessed value to true market value, with respect to transportation property, exceeds by at least 5 per centum the ratio of assessed value to true market value, with respect to all other commercial and industrial property in the same assessment jurisdiction. 4-R Act § 306.

concerned the second half of BNRR's 1989 taxes because Iowa permits taxpayers to pay ad valorem taxes in two installments and the parties already had entered into a consent injunction regarding the first installment of BNRR's 1989 taxes.

The second installment of BNRR's 1989 ad valorem taxes was due on or before March 31, 1991. On February 13, 1991, BNRR moved for a preliminary injunction prohibiting collection of the taxes. The district court held a hearing to decide whether to grant BNRR's motion. At the hearing, both BNRR and Bair supported their respective positions with briefs and affidavits. Because we decline to address any factual issues in this opinion, we need not review the specific contents of the various documents.

In deciding whether to grant the preliminary injunction, the district court made two important rulings. First, the court ruled that a "reasonable cause" standard, as opposed to traditional equitable principles,[3] governed

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[3] This court outlined the proper equitable considerations for determining whether an injunction should issue in *Dataphase Sys., Inc. v. C L Sys., Inc.*, 640 F.2d 109 (8th Cir.1981): "(1) the threat of irreparable harm to the movant; (2) the state of the balance between this harm and the injury that granting the injunction will inflict on other parties litigant; (3) the probability that movant will succeed on the merits; and (4) the public interest." *Id.* at 113.

the issuance of injunctions under section 306. The district court followed the Tenth Circuit's opinion in *Atchison, T. & S.F. Ry. v. Lennen*, 640 F.2d 255, 260 (10th Cir.1981). Under the reasonable cause standard, the district court does not balance the equities between the parties, but, instead, simply determines whether reasonable cause exists to believe that a violation of the act has occurred. *See id.* at 260-61. Second, the district court ruled that only BNRR's evidence, and not Bair's, was relevant to its determination. Relying on this court's opinion in *Sharp ex rel. NLRB v. Omaha Bldg. & Constr. Trades Council*, 821 F.2d 516, 517 (8th Cir.1987), the district court concluded that under the reasonable cause standard, an injunction should issue if facts exist which reasonably could support the movant's position, even if those facts are in dispute.

After reviewing BNRR's evidence, the district court held that BNRR had presented sufficient facts which could reasonably support its position that the 1989 ad valorem taxes for Iowa violated section 306. The district court, therefore, granted BNRR's motion for a preliminary injunction. For the reasons discussed below, we affirm the district court's first ruling, but reverse its second one, and remand for a new hearing with directions to consider all the evidence presented by both parties.

II. DISCUSSION

We begin by noting that the district court's decisions to apply a reasonable cause standard and to examine only BNRR's evidence in determining whether to grant BNRR a preliminary injunction under section 306, concern the interpretation and application of a federal statute. As such, our review of the district court's rulings is plenary. *Stevenson v. Stevenson Assocs. (In re Stevenson Assocs., Inc.,)*, 777 F.2d 415, 418 (8th Cir.1985).

A. Reasonable Cause Standard

Bair's initial claim on appeal is that the district court erred in applying a reasonable cause standard as opposed to traditional equitable principles in determining whether to grant BNRR an injunction under section 306. We disagree. Instead, we, like the Ninth Circuit before us, find the Tenth Circuit's analysis in *Lennen* persuasive. *See Trailer Train Co. v. State Bd. of Equalization*, 697 F.2d 860, 869 (9th Cir.), *cert. denied*, 464 U.S. 846, 104 S.Ct. 149, 78 L.Ed.2d 139 (1983) (citing *Lennen*, 640 F.2d at 259-61).

It is a well-established rule that where Congress expressly provides for injunctive relief to prevent violations of a statute, a plaintiff does not need to demonstrate irreparable harm to secure an injunction. *See United States v. City of San Francisco*, 310 U.S. 16, 31, 60 S.Ct. 749, 757, 84 L.Ed. 1050 (1940); *Lennen*, 640 F.2d at 259-260 (citing numerous cases). In such situations, it is not the role of the courts to balance the equities

between the parties. The controlling issue is whether Congress has already balanced the equities and has determined that, as a matter of public policy, an injunction should issue where the defendant is engaged in, or is about to engage in, any activity which the statute prohibits. *See id.* at 259. The proper role of the courts is simply to determine whether a violation of the statute has or is about to occur. *See id.* at 261.

Along with the Tenth and Ninth Circuits, we believe section 306 falls within the category of statutes that limit the traditional equitable discretion of the courts. The purpose of the 4-R Act was "to promote the revitalization of [the United States] railway system." 4-R Act § 101(a), 90 Stat. at 33. One of Congress's express policies in the statute was to "balance the needs of carriers, shippers, and the public." *Id.* § 101(b)(1). Congress considered the circumstances surrounding state taxation of railroads and declared that "[t]he levy or collection of any ad valorem property tax on transportation property at a tax rate higher than the tax rate generally applicable to commercial and industrial property in the same assessment jurisdiction" constitutes "an unreasonable and unjust discrimination against, and an undue burden on, interstate commerce." *Id.* § 306, 90 Stat. at 54. Congress, therefore, weighed the potential equities between state and local governments and railroads in enacting the 4-R Act. By expressly providing for injunctive relief in section 306, Congress indicated that, as a matter of public policy, the equities supported such relief where a violation of the act has or is about to occur. The courts are not free to reweigh Congress's

balancing of the policy considerations underlying section 306. *See Burlington N. R.R. v. Oklahoma Tax Comm'n*, 481 U.S. 454, 464, 107 S.Ct. 1855, 1861, 95 L.Ed.2d 404 (1987).

Bair urges us to reject the Tenth Circuit's analysis in *Lennen*, arguing that the decision conflicts with the United States Supreme Court's opinion in *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 102 S.Ct. 1798, 72 L.Ed.2d 91 (1982). In *Romero-Barcelo*, the Navy was discharging ordinance into waters surrounding Puerto Rico without a permit as required by the Federal Water Pollution Control Act (FWPCA). The plaintiffs demanded an injunction, for which the FWPCA expressly provided, to prevent the Navy's continued violation of the statute. *Id.* at 306-07, 102 S.Ct. at 1800. The Supreme Court, however, held that the FWPCA does not require a district court to issue an injunction for every statutory violation, but, instead, allows the court to order relief it considers appropriate to secure compliance with the statute. *Id.* at 318, 102 S.Ct. at 1806. The Court emphasized that the FWPCA provided for a variety of remedies, including criminal fines and penalties as well as injunctions, and that the illegal discharge did not actually harm the quality of the water. The Navy's conduct, therefore, only violated a technical requirement of the FWPCA, not its underlying purpose. *Id.* at 314-15, 102 S.Ct. at 1804-05.

Romero-Barcelo held that a statute that expressly provides for equitable relief does not automatically restrict a district court's traditional equitable discretion. The Supreme Court recognized, nonetheless, that the

Congress may impose such restrictions, either explicitly in the statute's text or implicitly in its scheme. *Id.* at 313. As an example, the Court discussed its opinion in *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 98 S.Ct. 2279, 57 L.Ed.2d 117 (1978). In *Hill*, the Supreme Court held that under the Endangered Species Act (ESA), a district court had to issue an injunction prohibiting the completion of a dam that threatened to eliminate an endangered species, the snail darter, by destroying its critical habitat. *Id.* at 194, 98 S.Ct. at 2301. The *Romero-Barcelo* Court distinguished *Hill* by noting that the ESA contained a flat ban on the destruction of critical habitats, which represented a direct policy choice by Congress, and under the circumstances, only an injunction would have prevented a violation of the ESA's fundamental purpose. The ESA's language and statutory scheme, therefore, restricted the district court's equitable discretion and the court had no choice but to issue an injunction. *Romero-Barcelo*, 456 U.S. at 314, 102 S.Ct. at 1804.

We believe that Bair's comparison between the 4-R Act and the FWPCA is inapposite. If any comparison is proper, it is between the 4-R Act and the ESA. Section 306 contains a flat ban on discriminatory taxation of railroads and the only form of relief available to prevent a violation of this ban is equitable. Moreover, a state that levies a discriminatory tax is not merely violating a technical provision of section 306; it is violating the very purpose of the section. As such, we do not agree with Bair's assertion that *Romero-Barcelo* undermines the analysis contained in *Lennen* and similar cases. On the contrary, we believe that the analysis of *Romero-Barcelo*

supports *Lennen* 's holding. Consequently, we conclude that a district court should grant a preliminary injunction under section 306 where a plaintiff has shown reasonable cause for the court to believe that a violation of the section has or is about to occur.[4]

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[4] The *Lennen* court adopted the phrase "reasonable cause" by analogizing section 306 to sections 10(j) and 10(l) of the National Labor Relations Act (NLRA), 29 U.S.C. § 160(j), (l) (1988) (as amended by Labor Management Relations Act, 1947, ch. 120, § 101, 61 Stat. 136, 149- 50), which authorize district courts to enjoin, at the request of the National Labor Relations Board, alleged violations of the NLRA. *See Lennen*, 640 F.2d at 260. Courts generally have held that a preliminary injunction should issue under sections 10(j) and 10(l) where reasonable cause exists to believe that certain unfair labor practices have occurred. *See, e.g., id.* (citing cases from various circuits). The Eighth Circuit, in particular, has held that an injunction should issue under sections 10(j) and 10(l) where (1) reasonable cause exists to the believe that a violation of the NLRA has occurred and (2) injunctive relief is just and proper. *See Minnesota Mining & Mfg. Co. v. Meter ex rel. NLRB*, 385 F.2d 265, 269 (8th Cir.1967) (section 10(j)); *Local Joint Bd., Hotel & Restaurant Employees & Bartenders Int'l Union v. Sperry*, 323 F.2d 75, 77 (8th Cir.1963) (section 10(l)). Bair contends that a comparison between the NLRA and the 4-R Act is inappropriate because the Eighth Circuit standards for granting injunctions under sections 10(j) and 10(l) actually differ. According to Bair, *Sperry*

adopted the reasonable cause standard under section 10(l), but *Minnesota Mining* rejected this standard in favor of traditional equitable principles under section 10(j). He explains the distinction by noting that section 10(j) does not contain the words "reasonable cause," while section 10(l) does. *Compare* NLRA § 10(j) *with id.* § 10(l). Finally, Bair infers that because section 306 also does not contain the words "reasonable cause," if any section of the NLRA should serve as a guide, it should be section 10(j), not section 10(l). Bair's analysis is flawed. *Minnesota Mining* does not reject reasonable cause as part of the standard for issuing injunctions under section 10(j). *Minnesota Mining* simply holds that reasonable cause alone is insufficient; injunctive relief also must be just and proper considering all the facts and circumstances of the case. *Minnesota Mining*, 385 F.2d at 269. In theory, this two-pronged standard is no different than the one contained in *Sperry*. In fact, the *Minnesota Mining* court cited *Sperry* in outlining the standard to be applied under section 10(j) and expressly noted that the standards applied under sections 10(j) and 10(l) are the same. *Id.* at 269 & n. 5. In practice, though, *Minnesota Mining* did consider traditional equitable principles, such as irreparable harm, in determining whether injunctive relief was just and proper. This interjection of traditional equitable principles into the just and proper prong appears to be an anomaly. The majority of other decisions have applied the prong far more narrowly. *Compare Minnesota Mining*, 385 F.2d at 272-73, *with Sperry*, 323 F.2d at 78-79; *Wilson ex rel. NLRB v. Milk Drivers & Dairy*

Employees Union, Local 471, 491 F.2d 200, 203 (8th Cir.1974) (citing *Minnesota Mining*); *Hendrix ex rel. NLRB v. Amalgamated Meat Cutters & Butcher Workmen, Dist. Local 340*, 555 F.2d 175, 178 (8th Cir.1977); *Solien ex rel. NLRB v. United Steelworkers*, 593 F.2d 82, 86-87 (8th Cir.), *cert. denied*, 444 U.S. 828, 100 S.Ct. 54, 62 L.Ed.2d 36 (1979); *Sharp ex rel. NLRB v. Omaha Bldg. & Constr. Trades Council*, 821 F.2d 516, 517-18 (8th Cir.1987). We, however, need not resolve the potential inconsistency in the application of sections 10(j) and 10(l). Unlike these sections, section 306 contains no language granting the district court discretion to determine whether injunctive relief is "just and proper." Instead, section 306 directs the court to issue whatever injunctive relief "as may be necessary" to prevent a violation of the section. *Compare* NLRA § 10(j), (l) *with* 4-R Act § 306. The just and proper prong of the standard under sections 10(j) and 10(l), therefore, does not serve as a guide in interpreting section 306. Moreover, we note that the comparison between section 306 and sections 10(j) and 10(l) is nothing more than a helpful analogy. As the result of litigation concerning sections 10(j) and 10(l) (section 10(l) in particular), the reasonable cause prong of the standard for issuing injunctions under these sections has become a well-developed alternative to traditional equitable principles. We adopt the reasonable cause prong as the alternative standard in the section 306 context because it is appropriate, not because our interpretation of sections 10(j) and 10(l) compels us to do so.

B. Relevant Evidence

Bair's next contention is that the district court erred in failing to consider his evidence when determining whether reasonable cause existed to believe that Iowa's 1989 ad valorem taxes levied against BNRR violated the 4-R Act. We agree. The district court's reliance on the conclusory language of *Sharp ex rel. NLRB v. Omaha Bldg. & Constr. Trades Council*, 821 F.2d 516 (8th Cir. 1987), is misplaced. In *Sharp*, this court held that a district court should examine only evidence presented by the petitioner in applying the reasonable cause standard under section 10(l) of the National Labor Relations Act (NLRA), 29 U.S.C. § 160(l) (1988) (as amended by Labor Management Relations Act, 1947, ch. 120, § 101, 61 Stat. 136, 149-50). *Sharp*, 821 F.2d at 517. Section 10(l) permits the National Labor Relations Board (NLRB) to petition a district court for a preliminary injunction prohibiting certain alleged unfair labor activities pending the NLRB's final resolution of the dispute. NLRA § 10(l).[5] The fundamental basis for *Sharp*'s holding, however, is contained in earlier opinions. A brief review

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[5] The standard for issuing injunctions under section 10(l) is actually two-fold: (1) reasonable cause must exist to believe that a violation of the NLRA exists and (2) injunctive relief must be just and proper. *Sharp*, 821 F.2d at 517. Only the reasonable cause prong of the standard concerns us here. *See supra* note 4.

of these opinions reveals that the underlying reason for examining only the petitioner's evidence in applying the reasonable cause standard under section 10(l) does not apply under section 306.

The *Sharp* court relied primarily on two earlier Eighth Circuit decisions, *Hendrix ex rel. NLRB v. International Union of Operating Eng'rs, Local 571*, 592 F.2d 437 (8th Cir.1979), and *Solien ex rel. NLRB v. United Steelworkers*, 593 F.2d 82 (8th Cir.), *cert. denied*, 444 U.S. 828, 100 S.Ct. 54, 62 L.Ed.2d 36 (1979). In *Hendrix*, we emphasized that in applying the reasonable cause standard under section 10(l), the district court must defer to both the statutory interpretations and rational factual inferences of the NLRB. *Hendrix*, 592 F.2d at 442. In *Solien*, we reaffirmed our basic view that the role of the district court under section 10(l) is very limited. We held that this role does not extend to resolving the underlying dispute between the NLRB and the other party, but merely to examining whether the NLRB has reasonable cause to believe that a violation of the NLRA has occurred. *Solien*, 593 F.2d at 86-87.

In reaching its conclusion, the *Solien* court quoted from our decision in *Hendrix ex rel. NLRB v. Amalgamated Meat Cutters & Butcher Workmen, Dist. Local 340*, 555 F.2d 175, 178 (8th Cir.1977), which in turn quoted from our decision in *Wilson ex rel. NLRB v. Milk Drivers & Dairy Employees Union, Local 471*, 491 F.2d 200, 203 (8th Cir.1974). In *Wilson*, we explained that the district court must defer to the NLRB under section 10(l), because the determination of whether a violation of the NLRA actually

has occurred "is reserved exclusively for the [NLRB] with review by the Court of Appeals." We expressly noted that an injunction under section 10(l) may be proper even where substantial conflict in the evidence exists. *Id.*

The *Wilson* court relied on an earlier decision as well, *Local Joint Bd., Hotel & Restaurant Employees & Bartenders Int'l Union v. Sperry*, 323 F.2d 75 (8th Cir. 1963), in which we first adopted the reasonable cause standard under section 10(l), *see id.* at 77. In *Sperry*, we noted that any attempt by the district court to finally adjudicate whether a violation of the NLRA actually had occurred would " 'ursurp the [NLRB's] function as the primary fact finder in cases arising under the [NLRA] and its function as primary interpreter of the statutory scheme.' " *Id.* at 77 (quoting *Schauffler ex rel. NLRB v. Local 1291, Int'l Longshoremen's Ass'n*, 292 F.2d 182, 188 (3d Cir.1961)).

Sharp's holding, consequently, ultimately rests on the principle that the district court must defer to the NLRB on disputed matters under section 10(l) because the NLRB, not the district court, is the final adjudicator of disputed fact issues under the NLRA. This deference to an administrative agency's authority, not any inherent aspect of the reasonable cause standard, explains why the district court examines only the petitioner's evidence when applying the reasonable cause standard under section 10(l). As discussed above, the reasonable cause standard flows from Congress's decision to expressly authorize injunctive relief in an act. Deference to the petitioner under an act such as the NLRA, in contrast,

stems from Congress's decision to grant primary fact-finding authority to the petitioner and not the court. The district court's reliance on *Sharp*, thus, is misplaced because unlike under the NLRA, the district court is the primary fact-finder under the 4-R Act. *See* 4-R Act § 306. As fact-finder, the district court does not owe special deference to the petitioner and, therefore, should consider all the evidence in applying the reasonable cause standard under section 306.

A simple analogy between proceedings under the NLRA and those under the 4-R Act, further clarifies that the district court, as fact-finder under the 4-R Act, should consider evidence from both parties before deciding whether to grant a preliminary injunction.[6] The NLRB, as fact-finder under the NLRA, presumably considers all the evidence available to it before deciding whether to seek a preliminary injunction. The NLRB then petitions the district court when it decides, after a preliminary investigation, that reasonable cause exists to believe that a violation of the NLRA has occurred. *See* NLRA § 10(l). The NLRB goes to the district court because it has no authority to issue an injunction on its own. The district court's role under section 10(l), therefore, is largely

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[6] BNRR contends that its position under section 306 is analogous to the NLRB's position under section 10(l). As this paragraph demonstrates, BNRR's analogy is seriously flawed. Its position is more comparable to that of a party who initially files a complaint with the NLRB, alleging that an unfair labor practice has occurred.

limited to granting injunctions where the NLRB's decision has a rational basis.[7] Thus, the court only examines the NLRB's evidence in determining whether reasonable cause exists. *See Sharp*, 821 F.2d at 517. Under section 306 of the 4-R Act, however, the district court has authority to find facts as well as grant injunctions. *See* 4-R Act § 306. The district court's role as fact-finder under the 4-R Act is directly comparable to the NLRB's role as factfinder under the NLRA. Just as the NLRB does under the NLRA, the district court should consider all the evidence available to it before deciding whether reasonable cause exists to believe that a violation of the 4-R Act has occurred.

III. CONCLUSION

Bair also raises various factual issues on appeal, but because we reverse the district court's ruling that it should only consider BNRR's evidence in deciding whether to grant a preliminary injunction, our examination of Bair's factual claims would be premature. We instead remand the case to the district court for further proceedings consistent with this opinion.

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[7] Although the district court also has discretion to determine whether injunctive relief is just and proper, this discretion is limited in practice. *See supra* note 4.

EXHIBIT II

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

Civil No. 90-0406B

Burlington Northern Railroad Company,

Plaintiff,

v.

Gerald D. Bair, Director of the Department of Revenue of Iowa,

Defendant.

RULING
GRANTING PLAINTIFF'S
MOTION FOR PRELIMINARY
INJUNCTION AND ORDER

On March 8, 1991, the undersigned heard Plaintiff, Burlington Northern Railroad Company's Motion For Preliminary Injunction. Having reviewed and considered the pleadings, affidavits and argument of counsel, I conclude that the preliminary injunctive relief sought by the plaintiff should be granted.

The proper standard for the issuance of injunctive relief under Section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976, 49 U.S.C. § 11503, is the "reasonable cause" standard as set forth in *Atchison, Topeka & Santa Fe Railroad Company v. Lennen*, 640 F.2d 255, 260 (10th Cir. 1981). I have examined the authorities cited by the defendant urging the application of a different standard for the issuance of an injunction, but I conclude that the standard as set forth in *Lennen* is appropriate.

In a similar context, the Eighth Circuit has held that "reasonable cause" exists to issue an injunction if there are facts which reasonably could support the movant's position, even if those facts are disputed. *Sharp v. Omaha Building & Construction Trades Council*, 821 F.2d 516, 517 (8th Cir. 1987). I am satisfied that Burlington Northern has met its burden of producing facts which reasonably could support its position, even though those facts are disputed, and I find that there is reasonable cause to believe that Section 306 has been or is about to be violated.

I have not, and I am not now deciding whether the plaintiff has shown a likelihood of success at the trial on the merits. Such a showing is not necessary under *Lennen*, and no inference should be drawn concerning the likelihood of success on the merits by the issuance of this injunction.

Defendant Bair's requests for supplemental findings of fact are denied.

IT IS THEREFORE ORDERED that the defendant, his agents, and those acting in concert or participation with him, are hereby enjoined and restrained from further assessing, levying or collecting from the plaintiff ad valorem tax payments for the second-half of tax year 1989, due on or before March 31, 1991.

IT IS FURTHER ORDERED that the plaintiff shall deposit the enjoined taxes into an interest-bearing escrow account established through the mutual agreement of the parties, pending further order of this Court.

Entered this 26th day of March, 1991, at 8:30 o'clock a.m.

s/ Harold D. Vietor
HAROLD D. VIETOR, Chief Judge
United States District Court
Southern District of Iowa

EXHIBIT III

PROHIBITING DISCRIMINATORY TAX TREATMENT OF TRANSPORTATION PROPERTY

SEC. 306. Part I of the Interstate Commerce Act (49 U.S.C. 1 et seq.), as amended by this Act, is further amended by inserting therein a new section 28, as follows:

"SEC. 28. (1) Notwithstanding the provisions of section 202(b), any action described in this subsection is declared to constitute an unreasonable and unjust discrimination against, and an undue burden on, interstate commerce. It is unlawful for a State, a political subdivision of a State, or a governmental entity or person acting on behalf of such State or subdivision to commit any of the following prohibited acts:

"(a) The assessment (but only to the extent of any portion based on excessive values as hereinafter described), for purposes of a property tax levied by any taxing district, of transportation property at a value which bears a higher ratio to the true market value of such transportation property than the ratio which the assessed value of all other commercial and industrial property in the same assessment jurisdiction bears to the true market value of all such other commercial and industrial property.

"(b) The levy or collection of any tax on an assessment which is unlawful under subdivision (a).

"(c) The levy or collection of any ad valorem property tax on transportation property at a tax rate higher than the tax rate generally applicable to commercial and industrial property in the same assessment jurisdiction.

"(d) The imposition of any other tax which results in discriminatory treatment of a common carrier by railroad subject to this part.

"(2) Notwithstanding any provision of section 1341 of title 28, United States Code, or of the constitution or laws of any State, the district courts of the United States shall have jurisdiction, without regard to amount in controversy or citizenship of the parties, to grant such mandatory or prohibitive injunctive relief, interim equitable relief, and declaratory judgments as may be necessary to prevent, restrain, or terminate any acts in violation of this section, except that---

"(a) such jurisdiction shall not be exclusive of the jurisdiction which any Federal or State court may have in the absence of this subsection;

"(b) the provisions of this section shall not become effective until 3 years after the date of enactment of this section;

"(c) no relief may be granted under this section unless the ratio of assessed value to true market value, with respect to transportation property, exceeds by at least 5 per centum the ratio of assessed value to true market value, with respect to all other commercial and industrial property in the same assessment jurisdiction;

"(d) the burden of proof with respect to the determination of assessed value and true market value shall be that declared by the applicable State law;

and

"(e) in the event that the ratio of the assessed value of all other commercial and industrial property in the assessment jurisdiction to the true market value of all such other commercial and industrial property cannot be established through the random-sampling method known as a sales assessment ratio study (conducted in accordance with statistical principles applicable to such studies) to the satisfaction of the court hearing the complaint that transportation property has been or is being assessed

or taxed in contravention of the provision of this section, then the court shall hold unlawful an assessment of such transportation property at a value which bears a higher ratio to the true market value of such transportation property than the assessed value of all other property in the assessment jurisdiction in which is included such taxing district and subject to a property tax levy bears to the true market value of all such other property, and the collection of any ad valorem property tax on such transportation property at a tax rate higher than the tax rate generally applicable to taxable property in the taxing district.

"(3) As used in this section, the term---

"(a) 'assessment' means valuation for purposes of a property tax levied by any taxing district;

"(b) 'assessment jurisdiction' means a geographical area, such as a State or a county, city, township, or special purpose district within such State which is a unit for purposes of determining the assessed value of property for ad valorem taxation;

"(c) 'commercial and industrial property' or 'all other commercial and industrial property' means all property, real

or personal, other than transportation property and land used primarily for agricultural purposes or primarily for the purpose of growing timber, which is devoted to a commercial or industrial use and which is subject to a property tax levy;

and

"(d) 'transportation property' means transportation property, as defined in regulations of the Commission, which is owned or used by a common carrier by railroad subject to this part or which is owned by the National Railroad Passenger Corporation."

EXHIBIT IV

49 U.S.C. SECTION 11503

Tax discrimination against rail transportation property

(a) In this section--

(1) "assessment" means valuation for a property tax levied by a taxing district.

(2) "assessment jurisdiction" means a geographical area in a State used in determining the assessed value of property for ad valorem taxation.

(3) "rail transportation property" means property, as defined by the Interstate Commerce Commission, owned or used by a rail carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title.

(4) "commercial and industrial property" means property, other than transportation property and land used primarily for agricultural purposes or timber growing, devoted to a commercial or industrial use and subject to a property tax levy.

(b) The following acts unreasonably burden and discriminate against interstate commerce, and a State, subdivision of a State, or authority acting for a State or subdivision of a State may not do any of them:

(1) assess rail transportation property at a value that has a higher ratio to the true market value of the rail transportation property than the ratio that the assessed value of other commercial and industrial property in the

same assessment jurisdiction has to the true market value of the other commercial and industrial property.

(2) levy or collect a tax on an assessment that may not be made under clause (1) of this subsection.

(3) levy or collect an ad valorem property tax on rail transportation property at a tax rate that exceeds the tax rate applicable to commercial and industrial property in the same assessment jurisdiction.

(4) impose another tax that discriminates against a rail carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title.

(c) Notwithstanding section 1341 of title 28 and without regard to the amount in controversy or citizenship of the parties, a district court of the United States has jurisdiction, concurrent with other jurisdiction of courts of the United States and the States, to prevent a violation of subsection (b) of this section. Relief may be granted under this subsection only if the ratio of assessed value to true market value of rail transportation property exceeds by at least 5 percent, the ratio of assessed value to true market value of other commercial and industrial property in the same assessment jurisdiction. The burden of proof in determining assessed value and true market value is governed by State law. If the ratio of the assessed value of other commercial and industrial property in the assessment jurisdiction to the true market of all other commercial and industrial property cannot be determined to the satisfaction of the district court through the random-sampling method known as a sales assessment ratio study (to be carried out

under statistical principles applicable to such a study). the court shall find, as a violation of this section -

(1) an assessment of the rail transportation property at a value that has a higher ratio to the true market value of the rail transportation property than the assessed value of all other property subject to a property tax levy in the assessment jurisdiction has to the true market value of all other commercial and industrial property; and

(2) the collection of an ad valorem property tax on the rail transportation property at a tax rate that exceeds that tax ratio rate applicable to taxable property in the taxing district.

(3)

FILED
JUN 24 1992
OFFICE OF THE CLERK

No. 91-1889

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

GERALD D. BLAIR, DIRECTOR IOWA DEPARTMENT OF REVENUE AND FINANCE,

Petitioner,

vs.

BURLINGTON NORTHERN RAILROAD COMPANY,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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29

QUESTION PRESENTED

Respondent restates the Question Presented as follows:

Have the Courts of Appeal been unanimously wrong in holding that a preliminary injunction should issue whenever the court finds "reasonable cause" to believe that a violation of Section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 54 (Feb. 5, 1976) ("Section 306"), has occurred or is about to occur?

LIST OF PARTIES TO THIS PROCEEDING AND RULE 29.1 STATEMENT

The Petitioner is the Director of the Department of Revenue and Finance of the State of Iowa (hereinafter referred to as the "Director").

Burlington Northern Inc. is the parent company of respondent Burlington Northern Railroad Company. The partially owned subsidiaries of respondent Burlington Northern Railroad Company are:

The Belt Railway Company of Chicago
Burlington Northern (Manitoba) Limited
Camas Prairie Railroad Company
Davenport, Rock Island and Northern Western Railway Company
Houston Belt & Terminal Railway Company
Iowa Transfer Railway Company
Kansas City Terminal Railway Company
Keokuk Union Depot Company
Longview Switching Company
M T Properties, Inc.
Northern Radio Ltd.
Paducah & Illinois Railroad Company
Portland Terminal Railroad Company
Terminal Railroad Association of St. Louis
Trailer Train Company
The Wichita Union Terminal Railway Company

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STATUTES

Section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 54 (Feb. 5, 1976)	*passim*

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

GERALD D. BAIR, DIRECTOR IOWA DEPARTMENT OF REVENUE AND FINANCE,

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BURLINGTON NORTHERN RAILROAD COMPANY,

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BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

OPINIONS BELOW

The opinions below are adequately identified in the Petition.

JURISDICTION

The jurisdictional grounds are adequately stated in the Petition.

STATUTORY PROVISION INVOLVED

The statutory provisions involved are adequately stated in the Petition and Exhibits III and IV thereto.

STATEMENT OF THE CASE

Burlington Northern amends and expands upon the Petitioner's Statement of the Case as follows.

Since the issuance of the mandate in this case, the parties have submitted additional evidence to the district court, and the district court conducted an additional hearing on the motion for preliminary injunction on June 4, 1992. The district court currently has the motion under advisement.

REASONS FOR DENYING THE WRIT

The Petition does not present any grounds for granting certiorari as set forth in Rule 10 of the Rules of this Court. Burlington Northern respectfully submits that the Petition should be denied.

1. There is No Conflict in the Circuits.

Every Circuit Court of Appeals to have considered the issue has concluded that the proper inquiry in a Section 306 case on Motion for Preliminary Injunction is whether reasonable cause exists to believe a violation of Section 306 has occurred, or is about to occur. *Burlington Northern Railroad Company v. Bair*, 957 F.2d 599 (8th Cir. 1992); *CSX Transportation, Inc. v. Tennessee State Board of Equalization*, No. 91-5270 (6th Cir., filed May 15,1992) (copy attached hereto as Exhibit 1); *Burlington Northern Railroad Company v. Department of Revenue*, 934 F.2d 1064, 1074 (9th Cir. 1991); *Trailer Train Co. v. State Board of Equalization*, 697 F.2d 860, 869 (9th Cir.), *cert. denied*, 464 U.S. 846 (1983); *Atchison, Topeka & Santa Fe Ry. Co. v. Lennen*, 640 F.2d 255 (10th Cir. 1981).

Thus, the Director undertakes the formidable double burden of showing first why this Court should review an issue which is so well settled in the courts below, and of showing some basis to conclude that

all of the circuits considering the matter may have been wrong. The Petition fails to meet these burdens.

2. No Special or Important Reasons Exist for Granting the Writ.

The Director makes two principal arguments as to why this Court should accept this case and reverse the ruling of the United States Court of Appeals for the Eighth Circuit. The Director first argues that the decision is contrary to *Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982), which did not interpret Section 306. Second, the Director argues that the decision below is contrary to the statutory language and supposed legislative history of Section 306.

These arguments, however, simply state the Director's conviction that the Eighth Circuit's decision was incorrect, and ignores the unanimous precedent to the contrary. The Director fails to show that this case presents an issue so special or so important to the public that it should be accepted by this Court, other than an oblique reference to the need of this Court "to preserve traditional judicial discretion over equitable cases", (Pet., p. 5) and the Director's perceived fear that the Eighth Circuit's decision "adds to the confusion regarding the standard to apply under any federal statute that authorizes interim equitable relief." (Pet., p. 7).

These complaints are exaggerated and unwarranted.

First, the Eighth Circuit carefully considered and distinguished this Court's decision in *Weinberger*. Relying on this Court's decision in *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978), the Eighth Circuit held that Section 306 was more apposite to the En-

dangered Species Act (ESA), and not to the Federal Water Pollution Control Act (FWPCA) at issue in *Weinberger*.

The Eighth Circuit did not, as claimed by the Petition, limit *Weinberger* to cases decided under FWPCA. Instead, the Eighth Circuit carefully considered the statutory schemes under Section 306 and the statutes construed by this Court's precedents, and correctly concluded that Section 306, like the ESA, contains a flat ban representing a direct policy choice by Congress to prohibit violations of the Act's fundamental purposes.

In addition to the Eighth Circuit, the Sixth Circuit and the Ninth Circuit have recently rejected claims that application of the "reasonable cause" standard under Section 306 is inconsistent with *Weinberger*. *See CSX Transportation, Inc. v. Tennessee State Board of Equalization, supra*; *Burlington Northern Railroad Company v. Department of Revenue, supra*.[1]

The Petition asserts that the Eighth Circuit's decision reveals a "misconception of the relation between Congress and the Judiciary." (Pet., p. 6). It does not. This Court has previously admonished that Section 306 constitutes clear and unambiguous legislation by Congress to prevent discriminatory taxation of railroads, and that the policy decisions and balances struck by Congress are binding on the judiciary. As this Court has stated:

> Respondents [the State] contend that injunctive relief against state taxation offends

[1] Although not discussed in the opinions, *Weinberger* was argued in each case by the defendant.

> the principles of comity. [Cite omitted]. The Court of Appeals found that its restrictions on valuation actions under §11503 [Section 306] are necessary in order to avoid "an inevitable clog of federal dockets" and "unreasonable delay of the state tax collection process." [Cite omitted]. These are policy considerations which may have weighed heavily with legislators who considered the Act and its predecessors. It should go without saying that we are not free to reconsider them now.

Burlington Northern Railroad Company v. Oklahoma Tax Commission, 481 U.S. 454, 464 (1987).

The Petition's strained statutory interpretation of Section 306 ignores the interpretation of the language in the Act by this Court in *Oklahoma Tax Commission*, and by the Courts of Appeal. The Eighth Circuit correctly observed:

> Section 306 contains a flat ban on discriminatory taxation of railroads and the only form of relief available to prevent a violation of this ban is equitable. Moreover, a state that levies a discriminatory tax is not merely violating a technical provision of section 306; it is violating the very purpose of the section. As such, we do not agree with Bair's assertion that *Romero-Barcelo* undermines the analysis contained in *Lennen* and similar cases. On the contrary, we believe that the analysis of *Romero-Barcelo* supports *Lennen*'s holding.

957 F.2d at 603.

Finally, the Petition relies on isolated and irrelevant statements from the extensive legislative history of Section 306 to support its argument that Congress intended for the traditional equitable principles to apply in preliminary injunction matters under Section 306. No such intent, however, can be gleaned from the legislative history. First, in *Oklahoma Tax Commission*, this Court disapproved of such reliance on isolated passages of legislative history to contradict the clear expression of Congress in Section 306. *See* 481 U.S. at 461. In any event, the references to the legislative history cited in the Petition do not stand for the principles ascribed to them by the Petition. For example, the testimony of Professor Sanders was directed to the question of the constitutionality of the proposed legislation in light of this Court's decision in *Moses Lake Homes, Inc. v. Grant County*, 365 U.S. 744 (1961), and not to the question whether traditional equitable criteria for injunctive relief should apply under Section 306. In addition, the reference to H.R. Rep. 725 is misleading, in that it does not discuss any testimony of Professor Sanders. This isolated reference to a single report cannot contradict what this Court and all courts have seen in the statutory language of Section 306 to be "a flat ban" on discriminatory taxation of railroads, with injunctive relief being the remedy mandated by Congress.

CONCLUSION

Although Section 306 is important legislation, the issue raised in this case does not warrant review by this Court. The courts below have consistently applied the correct standard in issuing preliminary injunctive relief. The Petition does not present any ground for

granting certiorari within the meaning of Rule 10 of the Rules of this Court and should be denied.

Respectfully submitted,

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APPENDIX

No. 91-5270

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

CSX TRANSPORTATION, INC.,
Plaintiff-Appellant,

v.

TENNESSEE STATE BOARD OF EQUALIZATION,
Defendant-Appellee.

ON APPEAL from the United States District Court for the Middle District of Tennessee

Decided and Filed May 15, 1992

Before: RYAN and BOGGS, Circuit Judges; and GODBOLD, Senior Circuit Judge.*

BOGGS, Circuit Judge. CSX is an interstate railroad operating in Tennessee. CSX filed this suit against the Tennessee Board of Equalization under § 306 of the Railroad Revitalization Act and Regulatory Reform Act of 1976, currently codified at 49 U.S.C. § 11503[1], which

*The Honorable John C. Godbold, Senior Circuit Judge for the United States Court of Appeals for the Eleventh Circuit, sitting by designation.

[1]49 U.S.C. § 11503 is the recodification of § 306 of the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31, 54, first codified at 49 U.S.C. § 26c (1976). The

prohibits discriminatory state taxation of railroads. At the outset of the litigation, CSX moved for a preliminary injunction against the further assessment, levy or collection of discriminatory ad valorem taxes in Tennessee. The district court denied the motion for a preliminary injunction and CSX appeals that decision to this court. For the reasons set forth below, we affirm the district court's denial of a preliminary injunction.

I

The purpose of the Railroad Revitalization and Regulatory Reform Act of 1976 (the "4R Act") was to "provide the means to rehabilitate and maintain the physical facilities, improve the operations and structure, and restore the financial stability of the railway system in the United States." § 101(a). Congress included § 306 to further these goals, particularly the goal of restoring the financial stability of the railroads. Section 306 was meant to eliminate the longstanding burden of discriminatory state and local taxation of railroad property. The relevant provisions of § 306, now § 11503, are as follows:

> (b) The following acts unreasonably burden and discriminate against interstate commerce and a State, subdivision of a State, or authority acting for a state or subdivision of a State may not do any of them:
>
> > (1) assess motor carrier transportation property at a value that has a higher ratio to the true market value of the motor carrier transportation property than the ratio that

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original Act was recodified in 1978. See Act of Oct. 17, 1978, Pub. L. 95-473, 92 Stat. 1337 *et seq.* The language of the recodification differs slightly from the original language of § 306. However, such changes "may not be construed as making a substantive change in the laws replaced." § 3(a), 92 Stat. 1466. *See also, Burlington R.R. Co. v. Oklahoma Tax Comm'n*, 481 U.S. 454, 457 n. 1. (1987). For this reason, no Senate Report was filed for the recodification. For convenience, we will cite to the recodification.

the assessed value of other commercial and industrial property in the same assessment jurisdiction has to the true market value of the other commercial and industrial property;

(2) levy or collect a tax on an assessment that may not be made under paragraph (1) of this subsection;

(3) levy or collect an ad valorem property tax on motor carrier transportation property at a tax rate that exceeds the tax rate applicable to commercial and industrial property in the same assessment jurisdiction.

(4) impose another tax that discriminates against a rail carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title.

(c) Notwithstanding section 1341 of title 28 and without regard to the amount in controversy or the citizenship of the parties, a district court of the United States has jurisdiction, concurrent with other jurisdiction of courts of the United States and the States, to prevent a violation of subsection (b) of this section. Relief may be granted under this subsection only if the ratio of assessed value to true market value of motor carrier transportation property exceeds by at least 5 percent, the ratio of assessed value to true market value of other commercial and industrial property in the same assessment jurisdiction. The burden of proof in determining assessed value to true market value is governed by State law.

Section 11503(a)(3) defines "motor carrier transportation property" as property used by a motor carrier providing

transportation in interstate commerce. Further, "commercial and industrial property" means property, other than transportation property and land used primarily for agricultural purposes or timber growing, devoted to a commercial or industrial use and subject to a property tax levy. § 11503(a)(4).

The original Section 306(2) expressly conferred jurisdiction on United States district courts "to grant such mandatory and prohibitive injunctive relief, interim equitable relief, and declaratory judgments as may be necessary to prevent, restrain, or terminate" any violations of the section. Since language changes that have occurred were not intended to be substantive, the recodification of § 306(2) at § 11503(c) also grants the authority to district courts to issue injunctive relief to prevent or terminate violations of § 11503(b). *Atchison, T. & S. F. Ry. v. Lennen*, 640 F.2d 255 (10th Cir. 1981). Section 11503(c) is an exception to the Tax Injunction Act, 28 U.S.C. § 1341 (1988), which provides that federal district courts "shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." See also *Burlington Northern R.R. v. Department of Revenue*, 934 F.2d 1064, 1067 (9th Cir. 1991).

Under traditional equitable principles for granting a preliminary injunction in this Circuit, a court must consider (1) whether the moving party has a substantial probability of success on the merits; (2) whether irreparable injury will occur if the injunction is not issued; (3) whether the injunction will have a harmful effect on third parties; and (4) whether the public interest would be served by the injunction. *Frisch's Restaurant, Inc. v. Shoney's, Inc.*, 759 F.2d 1261, 1263 (6th Cir. 1985). In addition, an injunction generally should not issue if there is an adequate remedy at law. *EBSCO Indus. v. Lilly*, 840 F.2d 333, 335-36 (6th Cir.), *cert. denied*, 488 U.S. 825 (1988). However, since Congress has expressly authorized the granting of injunctive relief to halt or

prevent a violation of § 11503, traditional equitable criteria do not govern the issuance of preliminary injunctions under § 11503. *Burlington Northern* 934 F.2d at 1074-75; *Trailer Train R.R. v. State Bd. of Equalization*, 697 F.2d 860, 869 (9th Cir.), *cert. denied* 464 U.S. 846 (1983); *Lennen*, 640 F.2d at 259-60; *State of Tenn. v. Louisville & N. R.R.*, 478 F. Supp. 199, 210 (M.D. Tenn. 1979). *See also United States v. City and County of San Francisco*, 310 U.S. 16, 30 (1940). In order to issue a preliminary injunction under § 11503, a court must determine only whether there is "reasonable cause" to believe that a violation of § 11503(b) has occurred or is about to occur. *Lennen*, 640 F.2d at 261.

II

In this case, CSX challenges several aspects of Tennessee's taxation system as discriminatory violations of § 11503(b). In Tennessee, all taxable real and personal property, including commercial and industrial property, is assessed by local assessors for the purpose of levying and collecting ad valorem taxes. T.C.A. §§ 67-5-102 and 65-7-103. Assessments of real property are made locally by periodic reevaluations by local assessors. Personal property is assessed annually on the basis of information supplied by property owners. However, the property of common carriers and public utilities is appraised annually at the state level by the Tennessee Public Service Commission. T.C.A. § 67-5-1301. The Commission appraises the value of a railroad's property as a single statewide unit and then apportions parts of the property's value to counties and municipalities according to statutory apportionment formulas. See T.C.A. §§ 67-5-1302(a)(2), 67-5-1323, 67-5-1324, and 67-5-1325.

Real and personal property is assessed for taxation at percentages of its true market value known as assessment ratios. T.C.A. §§ 67-5-801(a) and 67-5-901(a). An assessment ratio is the ratio of the assessed value to the true market value of the property. Pursuant to Article II, Section 28 of the Tennessee Constitution, railroad real

property is assessed at 40% of its true market value. Under its Constitution, Tennessee also assesses industrial and commercial property at 40% of its true market value. The state assesses railroad personal property at 30% of its true market value. Industrial and commercial personalty is also assessed at 30% of its value.

Assessments of railroad property are made annually by the Commission, primarily on the basis of information supplied by property owners in a schedule filed with the Assessment Division. T.C.A. § 67-5-1301. The Commission first conducts a mass appraisal of the "unit value" for all of the railroad's operating property in its entire multi-state system. T.C.A. § 67-5-1302. The Commission then applies an allocation factor to apportion part of the system's value to Tennessee. T.C.A. §§ 67-5-1322, 1323. Finally, the Commission distributes assessed taxation values for railroad property to the various counties and municipalities in Tennessee according to the statutory apportionment formulas.

The State Board of Equalization reviews the assessments made by the Public Service Commission. T.C.A. § 67-5-1328. The State Board of Equalization is part of an elaborate statutory process in Tennessee to ensure that centrally valued railroad property is assessed at the same level as locally valued property. T.C.A. § 67-5-1603, *et seq*. The local assessment of property values is usually below 100% of fair market value because most counties do not value all real property annually. Railroad property, on the other hand, is appraised annually at full value by the Commission. More frequent assessment generally results in higher relative taxation, since more of the actual current market value is captured in the assessed value to which the statutory assessment ratios are then applied. In Tennessee, a statutory process known as equalization is meant to ensure that centrally valued railroad property is assessed at the same level as local, county assessed property. As part of this process, the Board of Equalization conducts appraisal ratio studies in all counties of the state every two years. T.C.A. § 67-5-

1605(b)(1). The Board then certifies to the Commission the appraisal ratios for each county so that they may be applied to railroad property. T.C.A. § 67-5-1606(c). The Board reviews the Commission to ensure that the appraisal of railroad property has been "equalized" on the basis of the median appraisal ratios for each county. T.C.A. § 67-5-1328. So, the Commission submits its estimates to the Board and, after review, the Board certifies the final values back to the Commission. The Commission then certifies the assessments to local officials for collection. T.C.A. § 67-5-1331(a).

In addition, the following aspects of the Tennessee tax code are relevant to this case. Business inventories, and farm and non-business personal properties are exempt from personal property taxation. T.C.A. § 67-5-901(a). However, unlike railroads, industrial and commercial businesses whose inventories are exempt must pay a Business Tax. T.C.A. § 67-4-701 *et seq.* Further, residential and farm real property is assessed at 25% of its value.

This case involves over $1 million in disputed tax payments due by CSX to Tennessee. CSX filed its motion to enjoin the state of Tennessee from assessing, levying or collecting the allegedly discriminatory taxes. CSX supported its motion with two expert affidavits. Tennessee responded with five affidavits of its own. As stated, the district court declined to issue CSX a preliminary injunction.

In count I of its complaint, CSX argued that there was "reasonable cause to believe" that Tennessee had violated § 11503(b)(4), which prohibits the imposition of "another tax that discriminates against a rail carrier," by imposing ad valorem taxes on CSX's personal property while other major classes of commercial and industrial personal property are untaxed or undertaxed. CSX claims that this results from the fact that certain classes of commercial and industrial personal property are exempt from taxation. In addition, contends CSX, major classes of business

personalty go undertaxed because of undervaluation and underreporting. According to CSX, the factors of Tennessee's exemption scheme, underreporting, and underassessment result in the railroad's personal property being taxed in its entirety, while only approximately 27.5% of the aggregate value of all other business and commercial personalty in Tennessee was taxed. Over one-third of CSX's rail transportation property is personalty. CSX contends that, under the circumstances, § 11503(b)(4) prohibits the state from imposing any taxes on the railroad's personal property or, alternatively, from taxing more than 27.5% of the true market value of its personalty.

In count II, CSX alleged that the Board had violated §§ 11503(b)(1) and (b)(2) by failing to equalize the valuation of its real property with that of locally assessed commercial and industrial real property. Specifically, CSX contends that the Board assessed CSX real property for purposes of ad valorem taxation for the 1990 tax year at an average ratio of assessed value to true market value (expressed as a percentage of true market value) of no less than 82%, while the real property of other commercial and industrial taxpayers in Tennessee was assessed at no more than 73.9% of market value.

The district court reviewed the respective affidavits and held that CSX had not established, based on the evidence submitted, reasonable cause to believe that either of the alleged violations had occurred or were about to occur. The court, therefore, denied CSX's motion for a preliminary injunction.

III

The decision of whether or not to issue a preliminary injunction lies within the discretion of the district court. This court, therefore, reviews a preliminary injunction determination under the abuse of discretion standard. *NAACP v. City of Mansfield*, 866 F.2d 162, 166-67 (6th Cir. 1989). A district court abuses its discretion when it

relies on clearly erroneous findings of fact or when it improperly applies the law. *Christian Schmidt Brewing v. G. Heileman Brewing*, 753 F.2d 1354, 1356 (6th Cir.), *cert. dismissed*, 469 U.S. 1200 (1985). The issue of whether the district court abused its discretion here depends primarily on the proper contours of the "reasonable cause to believe" standard employed in § 11503 cases.

CSX presented the affidavit of Dr. Dick Netzer in support of its first allegation that Tennessee's taxation scheme violates § 11503(b)(4). Dr. Netzer is a Professor of Economics and Public Administration who was asked by CSX to prepare estimates of the market value of business inventories, locally-assessed machinery and equipment, and locally-assessed farm machinery and livestock in Tennessee as of December 31, 1987. In addition, Netzer was asked to calculate the relationships between the estimated fair market values of those properties and the assessed values and corresponding full values of the properties as they appear on the Tennessee tax rolls as reported by the State Board of Equalization. Using various methods, Netzer concluded that as of December 31, 1987, only 21.8% of the estimated market value of locally-assessed personal property was taxed in the state of Tennessee (If the value of motor vehicles is excluded, the percentage of personal property actually taxed is 23.9%). *Netzer Aff.* at 6. Netzer attributes this undertaxation to the statutory exemption of certain business inventories and farm machinery and livestock, and the fact that business equipment is underreported and/or undervalued. *Ibid.* CSX claims that this amounts to a violation of § 11503(b)(4).

Tennessee responded by arguing that (1) the court should not consider the impact of personal property exemptions under the plain meaning of § 11503; (2) even if § 11503 does require consideration of various statutory exemptions, the Tennessee exemption scheme is neutral and does not discriminate against railroads; and (3) the methodology of CSX's experts is faulty and does not

provide reasonable cause to believe there is or will be a violation of the Act. The district court held that courts may consider the impact of state schemes of personal property exemptions when determining whether a violation of § 11503(b)(4) has occurred. Second, the district court considered whether the exemption scheme was nondiscriminatory. The state argued that its taxation system is equitable since commercial and industrial businesses that receive an inventory exemption are subject to a business tax on gross receipts. CSX does not receive the inventory deduction but it is not subject to the business tax. Further, argued the state, if CSX had any inventory intended for sale it could receive the deduction, so the exemption is nondiscriminatory. After a review of the case law, the district court held that it must consider not only the language, but also the impact, of the inventory exemption. Discrimination violative of § 11503(b)(4) could be achieved by exempting most commercial and industrial property through the use of facially neutral exemptions, such as inventory exemptions, that nonetheless have a discriminatory effect on railroads.

The district court then examined Tennessee's taxation of commercial and industrial personal property compared to the state's taxation of railroad personalty, given the effect of the various challenged exemptions. In order to determine whether CSX had met the "reasonable cause to believe standard," the court looked to the Netzer affidavit as well as those presented by the Board of Equalization to counter Netzer's methodology. The affidavits of Dr. Harry Green and Dr. William Fox both attacked and undermined various assumptions and calculations made by CSX's expert, Dr. Netzer, in concluding that Tennessee's taxation scheme results in discrimination against the railroad. Dr. Green, for instance, maintains that if Netzer's methodology for valuing non-railroad property is applied to CSX's railroad property, it would yield a market value that is over three times the value currently placed on railroad property by the state. The district court recognized the implication of Dr. Green's affidavit that Netzer's analysis vastly overvalues commercial and

industrial personal property in Tennessee. Green's affidavit, therefore, undermines CSX's contention that it is suffering discrimination. After considering the conflicting affidavits concerning CSX's first claim, the district court concluded:

> [T]he Court finds that CSX has not demonstrated reasonable cause to believe that Tennessee's taxation system violates § 11503(b)(4) of the 4R Act and that injunctive relief should issue. The Court is confronted with conflicting evidence about whether Tennessee's taxing system results in an unfair and discriminatory tax burden on the railroads. Dr. Netzer's affidavit supports the likelihood that such a violation could occur. But Dr. Greene's [sic] affidavit calls into question the validity of such an analysis. A preliminary injunction under the 4R Act does not automatically issue upon supporting evidence by a plaintiff. The court must consider all the evidence and reach a determination that the plaintiff has satisfied the "reasonable cause" hurdle. In this particular case, considering the divergent evidence before it, the Court is not convinced that CSX has established a "reasonable probability of success . . . in order for a preliminary injunction to issue." *Lennen*, 640 F.2d at 261.
>
> The denial of the preliminary injunction is not intended to be a ruling on the merits of this case or that CSX's methodology of valuation is faulty. The parties will have ample opportunity to battle about the accuracy of CSX's analysis at a subsequent hearing on the merits.

Mem. Op. at 17-18.

The district court dealt with CSX's second challenge to Tennessee's state taxation scheme in much the same way. CSX alleged that Tennessee violated §§ 11503(b)(1) and (b)(2) by imposing ad valorem taxes on the railroad's real

property at an average ratio of assessed value to true market value of no less than 82% while other commercial and industrial real property in the state was assessed at an average ratio of assessed value to true market value of no more than 73.9%. As stated above, § 11503(b)(1) prevents states from imposing any tax on railroad property at a higher ratio of assessed value to true market value than the ratio at which commercial property is assessed. Section 11503(b) (2) prohibits the levy or collection of a tax on an assessment that violates § 11503(b)(1). In order to obtain an injunction, a railroad must show at least a five percent difference between the ratio of assessed value to true market value of its property and the ratio of assessed value to true market value of other commercial and industrial property. § 11305(c). CSX claims that it has established more than this requisite 5% gap.

In making its determination regarding CSX's second claim, the district court was again faced with a battle of affidavits. CSX presented the court with the affidavit of Dr. Frederick Ekeblad to establish the alleged gap in the relative ratios of assessed values to true market values. The state countered with the affidavit of Mr. Kenneth Morrell, the state Assessment Systems Manager, which challenged Ekeblad's methodology and asserted that commercial and industrial real property in Tennessee was appraised at approximately 87% of true market value for the tax year 1989. This result would make Tennessee's taxation scheme perfectly consistent with § 11503. The district court ultimately held that CSX had failed to establish the requisite reasonable cause to believe that a violation of the Act had occurred or was imminent and, therefore, denied CSX's motion for a preliminary injunction.

IV

On appeal, CSX argues that the district court abused its discretion because it incorrectly applied the "reasonable cause to believe" standard. CSX contends that the two affidavits it submitted to the district court were enough to

establish a prima facie case of discriminatory taxation and, therefore, were sufficient to meet the "reasonable cause" standard. CSX argues that the standard does not require the court to engage in any extensive fact finding, nor may a district court resolve conflicts in the evidence. CSX supports its argument with the following language from a Sixth Circuit case discussing the "reasonable cause" standard in the context of the National Labor Relations Act:

> [A] section 10(j) hearing is only a "reasonable cause" hearing -- the Board does not have to prove, and the district court is not required to find, that an unfair labor practice occurred. In making a reasonable cause determination, the district court and this court on appeal are not supposed to resolve conflicts in the evidence. The evidence available to the district court was clearly adequate to determine whether the Board had reasonable cause to believe unfair labor practices had occurred. Since the district court is not permitted to resolve conflicts in the evidence, a "complete" story is not necessarily required to make this determination.

Gottfried v. Frankel, 818 F.2d 485, 493 (6th Cir. 1987) (citations omitted). CSX claims that the this case supports its characterization of the "reasonable cause to believe" standard as relatively easy to meet. CSX maintains that the district court applied a stricter standard for a preliminary injunction than is required under § 11503.

We hold that the district court did not abuse its discretion in applying the "reasonable cause to believe" standard to the facts of this § 11503 case. In order for a preliminary injunction to issue under § 11503, the plaintiff must present evidence sufficient to establish reasonable cause to believe that a violation of the Act has occurred or is likely to occur. More precisely, in order to be granted a preliminary injunction, a moving party must establish a reasonable probability of a violation of the Act.

In this case, the district court found that CSX had simply "not produced enough evidence to show reasonable cause to believe that a violation of § 11503 of the 4R Act will occur." *Mem. Op.* at 21. The district court did not, as CSX suggests, ultimately resolve conflicts in the evidence presented in this case. In fact, the district court expressly stated that the "denial of the preliminary injunction is not intended to be a ruling on the merits of this case or that CSX's methodology of valuation is faulty." *Id.* at 18.

The fundamental dispute in this case concerns the nature of the "reasonable cause to believe" standard. It certainly cannot be met, as CSX seemingly argues, by simply showing the possibility of a violation of § 11503. A preliminary injunction should not issue *per se* whenever a plaintiff in a § 11503 case presents an affidavit purporting to establish a violation of the Act. The mere "possibility" that a violation will occur is not enough. A party must establish, to the satisfaction of the district court acting within its discretion, a reasonable probability that a violation of the Act has occurred or will occur.

If the standard could be met merely by presenting an affidavit from an expert claiming, based on any methodology, that a state's taxation scheme discriminated against railroads, then the decision of whether to issue an injunction would, in most instances, be taken out of the hands of the district court. No suit is filed under § 11503 in the first place unless a party feels that a state's taxation scheme, as characterized by that party, discriminates on its face or in operation. However, preliminary injunctions cannot and should not issue every time a § 11503 suit is filed, and the plaintiff moves for such an injunction supported by some scintilla of evidence. The district court must make a preliminary determination, based on the evidence that has been submitted by the plaintiff and the responses made at that point, whether there is reasonable cause to believe that the Act has been violated.

CSX further suggests that the reasonable cause standard somehow permits the district court to review only that

evidence presented by the party moving for the injunction. In other words, the argument is that since the court may not *resolve* conflicts in the evidence at the preliminary injunction stage, then the court may not even recognize or consider the existence of such conflicts. In deciding whether the plaintiff has met its burden under the reasonable cause standard, a district court must review and evaluate the evidence presented by the moving party and determine whether that evidence establishes a reasonable probability of discriminatory taxation. In evaluating the sufficiency of the evidence presented by a plaintiff moving for an injunction, the district court is not confined solely to the testimony presented in the plaintiff's affidavits and other submissions to the court. On the contrary, the district court is entitled to consider opposing submissions presented by the defendant, calling into question the plaintiff's assumptions, methodology, or conclusions. If the district court finds that the plaintiff's preliminary evidence is questionable enough to fall short of the "reasonable cause to believe" standard, the court is well within its discretion in refusing to grant a preliminary injunction.

This preliminary consideration of the evidence in order to make the "reasonable cause" determination is perfectly consistent with the fact that district courts are precluded from making an ultimate resolution of a conflict in the evidence at such an early stage in the proceedings. Evidentiary conflicts must not be resolved, but they should be evaluated, by a district court faced with a preliminary injunction determination under § 11503. After reviewing the affidavits presented in this case, we conclude that the district court was well within the bounds of its discretion in choosing not to issue a preliminary injunction. Under the abuse of discretion standard, a reviewing court cannot overturn a district court solely because it would have made a different decision under the circumstances. Since we cannot say that the district court abused its discretion in this case, there can be no reversal.

At oral argument, CSX urged this court to consider the fact that if it were forced to pay these taxes to the various localities in Tennessee, it might never recover these funds if the case is ultimately resolved in its favor. First of all, a diligent district court can certainly craft a remedy, such as future tax credits, that would ensure recoupment of the funds. More importantly, however, is the fact that such a consideration has no place in the "reasonable cause" analysis. CSX must abide by the "reasonable cause to believe standard," which it has so vigorously advanced and supported in this case. CSX cannot abandon the standard when it no longer serves the railroad's purposes. The standard precludes the court from considering anything except the reasonably probable outcome of the case, insofar as it can be determined at the current stage in litigation.

V

For the reasons discussed, we AFFIRM the district court's denial of a preliminary injunction to CSX.